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Supreme Court, U.S.
FILED
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No. _____

in the

Supreme Court

of the

United States

RONALD JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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64 pp

QUESTIONS PRESENTED

I.

Whether Guidelines amendments which are not made explicitly retroactive under U.S.S.G. § 1B1.10 can be considered by a district court under 28 U.S.C. § 2255

II.

Whether the Petitioner's panel on his original appeal considered the newly amended Guidelines.

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RONALD JONES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Ronald Jones, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of

Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 3, 1999.

OPINION BELOW

The Sixth Circuit's decision denying a petition for rehearing en banc is unreported, and is reproduced herein as Appendix 1. The amended opinion of the Court of Appeals for the Sixth Circuit is reported at 178 F.3d 790 (6th C. 1999), and is reproduced herein as Appendix 5. The original panel's decision is reported at 1 161 F.3d 397 (6th C. 1998), and is reproduced herein as Appendix 4. The district court's order denying the Petitioner's § 2255 was not published, but is attached to this petition in Appendix 3. The district court's order adopted the magistrate's findings, attached to the petition as Attachment 2.

JURISDICTION

The judgment of the United States

Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc was entered on August 3, 1999. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of*

life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner was convicted on a superceding indictment charging the Petitioner with one count of conspiracy to possess with the intent to distribute cocaine, in violation of 21 USC § 846 and § 841. The Petitioner was sentenced on November 13, 1992, to a term of 324 months incarceration, to be followed by a period of 5 years supervised release.

The Petitioner appealed his sentence and conviction to the Sixth Circuit (Case No. 92-6675), raising the following issues:

I. Whether the court erred in denying a motion to dismiss based upon outrageous Government misconduct

II. Whether the court erred in denying a motion for judgment of acquittal

III. Whether the Court erred in limiting cross

examination of a witness

IV. Whether the Guidelines under § 3E1.1, § 3B1.1, § 3C1.1, and § 2D1.1 were improperly determined

The Court denied the appeal in its entirety on November 29, 1993.

On January 26, 1995, the Petitioner filed a motion pursuant to 28 U.S.C. § 2255 into the district court. A supplement was filed, and the Government responded. On March 20, 1996, the district court issued an order denying in part the motion, but setting an evidentiary hearing on a particular aspect of the ineffective assistance of counsel.

A hearing was held on this order before Magistrate James Allen on October 22, 1996. On November 4, 1996, the Magistrate issued proposed findings of fact, and the district court adopted these findings on January 28, 1997.

The Petitioner subsequently appealed this decision to the Sixth Circuit Court of

Appeals. On November 30, 1998, the Court entered an order affirming the court's denial in part, but remanding for resentencing. The Sixth Circuit held that an amendment to § 3B1.1 could be retroactively applied to the Petitioner under § 2255, and if the amendment was applied, an enhancement under § 3B1.1 was inappropriate.

The Government then moved for a petition for rehearing and rehearing en banc. On May 28, 1999, the panel issued an amended opinion, finding that because the enhancement went into effect on November 1, 1993, 29 days before the Petitioner's appeal was decided, the amendment was available to him, and therefore, the Petitioner should have raised the matter on direct appeal. A subsequent request for rehearing en banc from the Petitioner was denied on August 3, 1999.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that his Fifth Amendment right to Due Process of law has been violated. The Petitioner did not have the amendment to § 3B1.1 available to him on appeal, and the Court's determination that the amendment would apply to overturn the Petitioner's sentence warrants relief.

3. Amended Guidelines may be applied retroactively under 28 U.S.C. § 2255

The Petitioner first contends that the panel's original decision was correct in that amendments, not made specifically retroactive under U.S.S.G. § 1B1.10, can be applied retroactively under 28 U.S.C. § 2255.

In the case of *Davis v. United States*, 417 U.S. 333 (1963), this Court held that § 2255 motions permit relitigation of an issue raised on direct appeal if the defendant is in custody and there is an intervening change of law. Further, the Sixth Circuit, in the case of *Callanan v.*

United States 881 F.2d 229 (6th C. 1989), found that where the district court had refused to apply new Supreme Court precedent to a defendant's case in a § 2255 motion, a remand was required. Specifically, the Court determined that, because the new case involved "a new interpretation of the substantive criminal law", that the case must be given retroactive effect. *Id.* at 231-232

The panel, in its initial opinion in this case, found that when Guidelines were amended to clarify application, that such clarifications could be applied retroactively under § 2255. *Jones v. United States*, 161 *F.*3d 397 (6th C. 1998) The Court reasoned that "A petitioner is entitled to the advantage of receiving the sentence he would have received had the Commission initially drafted an unambiguous provision. It is unfair to punish a defendant for the Commission's lack of clarity, especially when the Commission

acknowledges and corrects the ambiguity." *Id.* at 403

The panel's decision to enter an amended opinion serves to create some doubt as to the validity of the above argument. The Petitioner submits that it is clear that where the Commission clarifies the Guidelines, it is stating how the Guidelines should have been read and interpreted from their beginning. Therefore, a defendant should have the ability to have the benefit of such a clarification.

The Petitioner would note to this Court that there is a split of opnion as to the circuits on this particular issue. For instance, the Third Circuit has agreed with the Sixth, and found that clarifications to the Guidelines should be applied retroactively under § 2255, *United States v. Marmolejos*, 140 F.3d 488 (3rd C. 1998); however, the Seventh Circuit has held the issue to not be worthy of § 2255 review.

Buggs v. United States, 153 F.3d 439 (7th C. 1998) Therefore, certiorari is required to settle this split among the circuits.

2. The Petitioner could not have raised the issue in the Court of Appeals on direct review

On November 30, 1998, the panel in this case issued an opinion remanding this case for resentencing. The panel determined that the Petitioner had the right to receive retroactive application of clarification to the Guidelines under 28 U.S.C. § 2255. Specifically, the Petitioner argued that a clarification, enacted on November 1, 1993, required a new evaluation of the Petitioner's § 3B1.1 enhancement. The panel agreed, finding specifically that the Petitioner only controlled property and not other persons in the enterprise; therefore, under the November 1, 1993 clarifications, he should not have received a § 3B1.1 enhancement.

On May 28, 1999, the panel entered an amended opinion denying relief. The panel determined that since the November 1, 1993

amendment became effective during the pendency of the Petitioner's direct appeal(Case No. 92-6675), the prior panel, consisting of Judges Boggs, Suhrheinrich and Brown, necessarily passed on the new guideline. Further, the panel determined that counsel for the Petitioner could have raised the issue prior to the decision.

It is clear from the record and from caselaw that the prior panel on direct review did not utilize the clarification in making their decision. On direct appeal, the Government argued that the Petitioner should receive an enhancement under § 3B1.1 because he was the "major player". The panel in 92-6675 relied on this language, and specifically determined:

> The district court found in the sentencing hearing that "if you look at all the proof, then it is obvious that Mr. Jones was a major player". We affirm this finding because we cannot say that it is clearly erroneous or an abuse of discretion.

By contrast, the § 2255 panel of Kennedy,

Cole and Russell, utilizing the clarified language of § 3B1.1, found specifically that the Petitioner only managed assets of the conspiracy, and as such, could not receive an enhancement under § 3B1.1.

If the direct appeal panel utilized the clarifications, then according to the analysis of the § 2255 appeal panel, it did so erroneously. The facts of this case, in relation to the § 3B1.1 enhancement, have not changed. As the district court specifically found, the Petitioner managed the assets of the conspiracy. As such, there is no manner in which the clarifications could have been utilized by the original panel to uphold the § 3B1.1 enhancement.

The panel's amended opinion also is contrary to the Sixth Circuit's decision in *United States v. Gort-DiDonato*, 109 F.3d 318 (6th C. 1997). In that case, the Court specifically found, "Our Circuit has yet to directly address the clarification set out

in Application Note 2 of § 3B1.1." *Id.* at 321-322. Therefore, the original panel in 92-6675 could not have utilized the clarification, because as of March 27, 1997, the clarification had not yet been addressed by the Sixth Circuit.

Further, the panel's decision on the direct appeal was made on November 29, 1993, only 29 days after the enactment of the § 3B1.1 clarification. The Petitioner's brief had already been filed in early 1993, and the reply brief was mailed on July 7, 1993. Certainly, there had been no judicial application of the clarification by a court during the 29 day period following enactment of the clarification. The Petitioner would submit that there was not an opportunity to argue this matter by former counsel.

In sum, the Petitioner submits that the record in this case proves that the clarification was not utilized by the panel in 92-6675. Further, the § 2255 appeal

panel has already determined that if the clarification is applied to the Petitioner's case, he should not receive the § 3B1.1 adjustment. The Petitioner should not be penalized for direct appeal panel's failure to utilize a new clarification on an appeal decision rendered 29 days after the enactment of the clarification. Equal protection and due process require that the Petitioner receive the benefit of this clarification. A new sentencing hearing is warranted.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand the case for a new sentencing hearing.

Respectfully submitted,

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APPENDIX

1. Decision denying en banc review, August 3, 1999

2. Magistrate's recommendation, November 4, 1996

3. District Court order denying § 2255 motion, January 23, 1997

4. Original panel decision, November 30, 1998

5. Amended decision of panel, May 28, 1999

97-5202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD D. JONES,	)	FILED
	)	JUL 23 1999
Petitioner-Appellant,	)	LEONARD GREEN,
	)	Clerk
v.	)	
	)	
UNITED STATES OF AMERICA,	)	O R D E R
	)	
Respondent-Appellee.	)	
	)	

BEFORE: KENNEDY and COLE, Circuit Judges; and RUSSELL,*District Judge.

The court having received a petition for rehearing en banc of the amended opinion filed May 28, 1999, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Further considering that counsel for the appellee was given until June 11, 1999 to either supplement its original petition for rehearing en banc or to withdraw it in light of the amended opinion and it did neither,

It is ORDERED that the appellee's petition for rehearing en banc is rendered moot.

ENTERED BY ORDER OF THE COURT

"S_____".
Leonard Green, Clerk
by Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,

FILED
96 NOV 4

VS.

RONALD D. JONES,
Defendant.

CR.NO.91-20055-H
CIV.NO.95-2057-G/A

PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND RECOMMENDED DISPOSITION

Defendant Ronald D. Jones (hereinafter referred to as "defendant") was, on April 16, 1992, tried and convicted in the United States District Court for the Western District of Tennessee for possession of cocaine with the intent to distribute, and, on November 13, 1992, was sentenced to imprisonment for 324 months.

Defendant has filed an original and supplemental motion to vacate his conviction and/or to modify his sentence, pursuant to the provisions of 28 U. S. C. § 2255. The District Court has disposed of, adversely to defendant, all of his claims except his claim that his retained counsel

was ineffective. As to this claim, the District Court concluded that an evidentiary hearing was required, and, on March 21, 1996, referred this matter to the United States Magistrate Judge for such an evidentiary hearing.

Defendant has contended that his trial counsel (William D. Massey) was ineffective in failing to review certain Guidelines provisions regarding the effect which other "relevant conduct" (i.e., other illegal but uncharged drug transactions) would have on defendant's sentence, should he be found guilty. Defendant has asserted that counsel failed to advise him that the court would be entitled to consider relevant uncharged conduct in determining the appropriate sentence, which could, in defendant's case, result in a sentence roughly six (6) times that which was being offered by the United States in a plea agreement (such offer being a five (5) year sentence, in exchange for a plea of guilty and cooperation). Defendant also asserts

that counsel incorrectly advised him that if he went to trial, the most he could get would be ten (10) years, if he were found guilty. In short, it is alleged by defendant that his attorney provided him with inaccurate advice as to his exposure, causing him to make a wrong decision in refusing the offer of the United States, resulting in his receiving a twenty-seven (27) year sentence, rather than a five (5) year sentence.

An evidentiary hearing was held in this matter on October 22, 1996, after numerous delays (caused by scheduling problems of counsel for the parties, scheduling problems of essential witness William D. Massey, and a problem in obtaining the presence of defendant at an evidentiary hearing already set). Testifying at this evidentiary hearing were defendant Ronald D. Jones, defendant's mother Frances Jones, and William D. Massey.

Proposed Findings of Fact

Defendant was, on or about February 20, 1991, arrested and charged with the attempted possession of approximately six (6) kilograms of cocaine. In about March of 1991, approximately three (3) or four (4) weeks after defendant's arraignment in Federal court, Ms. Frances Jones (the mother of defendant) retained William D. Massey as attorney to defend defendant against these charges. Massey had numerous discussions about this case, with defendant, his mother, and the prosecutor, Assistant U. S. Attorney John Fowlkes.

As a result, Massey concluded that the only defense he could offer on behalf of his client was entrapment, since defendant was captured on video engaging in the drug transaction. This transaction was apparently secretly controlled by law enforcement, by the use of a "cooperating individual", and the six (6) kilograms of "drugs" being sold to defendant were in fact sham.

Defendant apparently felt that the charge could not be serious, because the 'drugs" were sham. Massey testified that he and defendant "got over this" (that is, apparently defendant was convinced that this would not be a defense). Massey apparently told defendant that he had an "arguing" case, because of alleged entrapment. He discussed with defendant the elements of an entrapment defense (inducement, predisposition, etc.), and defendant indicated that he thought the cooperating individual (Woods), "set him up". Apparently Woods made the initial contact with defendant, which led to the drug transaction. Massey, in investigating the question of predisposition, looked for any prior drug dealing by defendant, but defendant never told Massey that he had had prior drug dealings with Woods or his brother. In fact, Massey did not know of these prior dealings (defendant admitted to three (3) or four (4) prior drug transactions with the Woods at this

evidentiary hearing) until the day of defendant's trial. In fact, prior to trial, and on December 12, 1991, Massey filed a memorandum in support of his motion to dismiss this indictment (on grounds of "excessive and egregious governmental involvement in the criminal enterprise"), and in this memorandum made the statement (p. 6) that "Ronald Jones was not involved in any pre-existing criminal enterprise at the time he was targeted." Exhibit 1.

At some point prior to defendant's trial, Assistant United States Attorney John Fowlkes told Massey that the United States would, on defendant's plea of guilty and agreement to cooperate, recommend to the court a sentence of five (5) years. Defendant testified that Massey turned this down on his own, and merely advised defendant of this action. Massey, on the other hand, testified that he brought this offer to defendant, saying that "this was a real good offer to settle two (2) cases". However, Massey testified, defendant

rejected this offer, and indicated a desire to go to trial. For reasons outlined below, it is SUBMITTED that Massey is the more credible witness on this point.

On the day of trial of defendant's case, Assistant United States Attorney John Fowlkes came to Massey and asked if he were aware that his client had been dealing in drugs with the Woods in the past, and that the total amount dealt, during all of these transactions, might exceed sixty (60) kilograms. Massey was surprised, and went to his client to ask him about this. Defendant responded to this by saying "my word against theirs". Massey said that, had he known of this prior to trial, he would have made defendant aware that his argument of entrapment would be "impaired".

At the trial of this case, Massey asked defendant whether he had had prior drug dealings with the Woods, and defendant denied any such dealing. Defendant, at the evidentiary hearing before me, insisted that he had told Massey of these prior

dealings prior to trial, and that Massey told him to deny these prior dealings when he testified at the trial. However, later in his testimony, defendant admitted that Massey did not tell him to lie, but just told him that it would be "your word against the informant's". Massey, on the other hand, testified that he never told defendant to lie, but rather admonished him to tell the truth when testifying. It is SUBMITTED that Massey's testimony is more credible on this point.

Defendant did testify at his criminal trial, denying any prior drug dealing with the Woods brothers. He was convicted, and the court, in passing sentence, decided that defendant had perjured himself on this issue, thereby obstructing justice. Based upon this, the court, applying USSG, §3C1.1, increased defendant's offense level by 2 levels. Further factoring in defendant's prior criminal activity, the court imposed the sentence complained of by defendant herein.

Therefore, assuming the truth of Massey's testimony, defendant himself was the author of his misfortune, by failing to fully inform his lawyer, by failing to accept a good offer from the United States, and by lying under oath at his trial. He certainly was not, it is SUBMITTED providing ineffective assistance of counsel.

The only proof to support defendant's claim of ineffective assistance of counsel, it is SUBMITTED, is his own testimony. He has, however, been officially declared a perjurer. He has told falsehoods in his testimony before me. He first stated that his lawyer told him to lie during his testimony at trial, regarding any prior drug dealings he may have had with the Woods brothers, only later to admit that this was not true. He testified that he knew nothing about Federal law at the time he was conferring with Massey, prior to his trial. He also said that he was "under (Massey's) spell". Incredibly, he even

testified that this was the first time he had "gone through the system". Later, on cross examination, he admitted that he had another Federal criminal trial, at which he was represented by Harold Archibald, another Memphis lawyer, who did not put defendant "under (his) spell". In spite of his alleged ignorance of Federal law, he appeared very conversant with the concept under the Sentencing Guidelines of "acceptance of responsibility". My impression of defendant at the evidentiary hearing in this case was that he was quite intelligent and conversant with affairs of the world. In short, it is SUBMITTED that defendant is totally lacking in credibility.

Proposed Conclusions of Law

The standard to be applied in post-conviction claims is set forth in Strickland vs. Washington, 466 U. S. 668 (1984).

There are two (2) components to this analysis: (1) whether counsel's performance

was deficient; and (2) if so, whether that deficient performance prejudiced the defense. Strickland, at 687. That prejudice must be so serious as to deprive a defendant of a reliable, or "fair" trial (as previously defined). Strickland, at 687. A court may, rather than rigorously proceed through the foregoing two-step process, decide the matter on the question of prejudice alone. Strickland, at 697.

The first component (i.e., "performance") requires a determination of whether counsel's performance was deficient, that is, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Strickland, at p. 687. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Strickland, at p. 688.

The second component (i.e., "prejudice") says that an error by counsel, even if professionally unreasonable, does

not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, at p. 691. "Prejudice", with regard to an ineffective assistance of counsel claim, implies that, but for a defense counsel's lack of competence, a criminal defendant would not have been convicted or would not have been punished so severely. This involves an appraisal of the merits of the criminal defendant's case, which necessitates a legal analysis. Bartling vs. Fruehauf Corp., F. 3d. (6th Cir. Nos. 93-3281/3324, decided and filed Sept. 23, 1994).

It is submitted that defendant has failed to establish that counsel's performance in this case was deficient. Counsel vigorously advocated the only defense available (entrapment). This defense was undercut and destroyed by defendant's failure to fully advise counsel of his prior drug dealings. The deficient performance here was, it is SUBMITTED, that

of the client, rather than that of the attorney.

The same principle applies to the question of whether counsel was ineffective in advising defendant whether or not to take the offer made him by the United States. Counsel told defendant that the offer was "a real good offer to settle two (2) cases". This recommendation was given, even though counsel did not know of defendant's prior drug dealings with the Woods brothers. Defendant made the decision to roll the dice, and he cannot it is SUBMITTED, blame his lawyer when that roll caused him to be a serious loser.

Recommended Disposition

For the foregoing reasons, it is RECOMMENDED that the motion by defendant Ronald Jones to vacate or set aside his prior conviction because of ineffective assistance of counsel be DENIED.

All parties are advised that all objections to this report and recommendation must be filed within ten

(10) days or such objections may be deemed waived by the District Court. Additionally, such a failure to file within ten (10) days may be treated as a waiver of the right to appeal the District Court's order hereon. U. S. vs. Walters, 639 F. 2d. 927 (6th Cir. 1981); Patterson vs. Mintzes, 717 F. 2d. 284 (6th Cir. 1983); Thomas vs. Arn, 474 U. S. 140 (1985); see also FED. R. CIV. P. 72(b).

Respectfully submitted this 30th day of October, 1996.

"S_____".
JAMES H. ALLEN
UNITED STATES MAGISTRATE
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED
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UNITED STATES OF AMERICA,

Plaintiff-Respondent,

VS. Civil No.95-2057-G/A

RONALD D. JONES,

Defendant-Petitioner.

JUDGMENT IN CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the provisions as set forth in the Order Denying 28 U.S.C. § 2255 Motion, entered January 24, 1997, this case is hereby DISMISSED in its entirety.

"S_____".
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

January 28, 1997
Date

ROBERT R. DI TROLIO
Clerk

"s_____".
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED
97 JAN 23

UNITED STATES OF AMERICA,
No. 95-2057-G/A

Plaintiff-Respondent

vs.

RONALD D. JONES,

Defendant-Petitioner.

ORDER DENYING 28 U.S.C. § 2255 MOTION

On March 21, 1996, this court entered an order denying in part petitioner Ronald Jones' motion pursuant to 28 U.S.C. § 2255 and denying Jones' supplemental § 2255 motion. The court referred to the United States Magistrate Judge for report and recommendation Jones' claim that he was denied effective assistance of counsel. The United States Magistrate Judge conducted an evidentiary hearing on this matter and filed his report and recommendation on November 4, 1996.

Defendant has objected to the magistrate judge's report.

The court has reviewed the record of the proceedings before the magistrate judge de novo and defendant's objections. Based on this de novo review the court adopts the magistrate judge's report and recommendation and finds that Jones' claim that he was denied effective assistance of counsel is without merit. The motion under 28 U.S.C. § 2255 is denied in its entirety.

To address petitioner's specific objections to the magistrate judge's report, petitioner first argues that the withdrawal of a motion to dismiss prior to trial supports and inference that defendant's counsel knew of petitioner's prior drug dealings prior to trial. While the court doubts that the withdrawal of this motion permits such an inference, the court finds as a factual matter that Massey did not know about the prior drug dealings prior to the day of trial.

With respect to the magistrate judge's

failure to discuss petitioner's mother's testimony, this testimony offers so little assistance to petitioner that discussion of it is unnecessary. The magistrate judge did note that petitioner's mother testified at the evidentiary hearing.

With respect to petitioner's arguments concerning his credibility, the court agrees that Massey is a far more credible witness than petitioner. The magistrate judge's reasoning with respect to these findings is in full accord with the court's views.

Finally, petitioner objects that the magistrate judge goes beyond the order of reference. This contention is without merit. While perhaps a portion of the court's order of March 21, 1996, might have been more artfully worded, clearly the entire claim of denial of effective assistance of counsel is referred to the magistrate judge for an evidentiary hearing (see Order Denying in Part Petitioner's Motion to Vacate Conviction or Modify

Sentence Pursuant to 28 U.S.C. § 2255, Order Denying Petitioner's Supplemental § 2255 Motion, and Order of Reference dated March 21, 1996, p.21). The court's references to any deficiency in counsel's performance obviously refer only to petitioner's allegations. The court could hardly have made a factual finding based on the allegations of the petition that counsel's performance was in fact deficient. Rather, the court simply indicated that petitioner's allegations, if proven, could establish deficient performance. Those allegations were not in fact proved at the evidentiary hearing. Thus, the consideration of prejudice to petitioner from deficient performance was not necessary.

IT IS SO ORDERED.

"s_____".
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

January 22. 1997
DATE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0349P (6th Cir.)
File Name: 98a0349p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD JONES,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 97-5202

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-02057—Julia S. Gibbons, Chief District Judge.

Argued: September 22, 1998

Decided and Filed: November 30, 1998

Before: KENNEDY and COLE, Circuit Judges;
RUSSELL, District Judge*

---

*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Kevin M. Schad, SCHAD, BUDA & COOK, Cincinnati, Ohio, for Appellant. Stuart J. Canale, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee. **ON BRIEF:** Kevin M. Schad, SCHAD, BUDA & COOK, Cincinnati, Ohio, for Appellant. Paul M. O'Brien, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

R. GUY COLE, JR., Circuit Judge. Ronald Jones appeals the district court's dismissal of his motion to vacate his conviction or modify his sentence pursuant to 28 U.S.C. § 2255. On appeal Jones raises three issues. First, he contends that the district court erred in finding that he failed to establish that his lawyer, William Massey, provided ineffective assistance of counsel. Second, Jones claims that the magistrate judge committed reversible error by exceeding the scope of the district court's order to determine whether Jones was prejudiced by Massey's alleged deficient performance. Finally, Jones contends that the district court erred by concluding that a recent amendment to U.S.S.G. § 3B1.1 did not require a new sentencing hearing.

For the following reasons, we **AFFIRM** in part and **REVERSE** in part, and **REMAND** for further proceedings in accordance with this opinion.

BACKGROUND

On or about February 20, 1991, Jones was arrested and charged with attempted possession with the intent to

distribute six kilograms of cocaine, a controlled substance.[1] The arrest was the result of a "drug deal" orchestrated by law enforcement officers. The officers gained the cooperation of Robert and Mel Woods, cousins from whom Jones had made prior drug purchases. Mel was working as an informant for DEA Special Agent James Akagi. Through the Woods' cooperation, the officers videotaped Jones's purchase of what he believed to be cocaine. Jones was arrested shortly afterwards.

Following his arrest, Jones's mother retained William Massey to defend him. Based on conversations with Jones and a review of Jones's criminal history, Massey concluded that the only possible defense Jones could raise was entrapment. Because Jones's criminal history did not reflect any prior felony convictions, Massey believed that he could prove that Jones lacked predisposition to commit the offense. Considering that their defense hinged on Jones's lacking a predisposition to commit drug offenses, Massey asked Jones whether he had committed prior offenses or engaged in conduct that could affect their entrapment claim. Though it is his practice to do so, Massey does not specifically remember advising Jones that this type of relevant conduct would also be an issue at sentencing.

Considering Jones's prior criminal history--no convictions, Massey assured him that if he went to trial there was little chance that the court would impose a sentence exceeding the statutory minimum of ten years pursuant to 21 U.S.C. § 841(b)(1)(A). At this time, Massey was not aware of the government's evidence that Jones had made prior purchases from the government informants involved in the current undercover operation. The government offered a plea agreement by which Jones would plead guilty and receive a sentence of five years imprisonment. Jones rejected the plea offer, presumably based on his belief that he was subject--at most--to ten years' imprisonment. Just before trial, the

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[1] Jones was charged with attempted possession because the substance he purchased was not actually cocaine.

Assistant United States Attorney, Mr. Folkes, advised Massey that the government had evidence that Jones was involved in other cocaine sales. According to Massey, he asked Jones about the government's claim and advised him that if the government indeed had evidence of prior drug sales it would quash their entrapment defense. Massey could not remember, however, whether he warned Jones that prior drug purchases that did not result in convictions could also increase his potential sentence. In response to Massey's warning, Jones replied: "It's my word against theirs."

At trial, Jones denied involvement in any prior drug sales. According to Jones's testimony, the current charge was the first time he dealt in cocaine, and he only did so at the insistence and nagging of the police informants. The jury apparently did not believe Jones and convicted him. Rather than the ten-year sentence Jones believed to be the maximum, the district court sentenced Jones to 324 months, or twenty-seven years, of imprisonment, taking into account Jones's relevant conduct.

In addition, the district court applied several enhancements under the guidelines to arrive at Jones's sentence. Among the enhancements it applied was an increase of two levels pursuant to U.S.S.G. § 3B1.1. This guideline provision requires a sentencing court to enhance a sentence two levels if the court finds that the accused served in a managerial or supervisory role during the criminal activity.[2] The court

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[2]Section 3B1.1 provides:

Aggravating Role:

Based on the defendant's role in the offense, increase the offense level as follows:

> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

concluded that because Jones had a "high-level" position in the criminal enterprise as evidenced by his financial means of procuring large quantities of cocaine, he qualified for an enhancement under the provision.

Jones appealed his conviction and sentence, and this court affirmed. Jones then filed a § 2255 motion in the district court in which he raised several claims. First, Jones asserted that Massey had rendered ineffective assistance of counsel when he failed to advise Jones of the effect that relevant conduct would have on Jones's sentence. Specifically, Jones claimed that when he had to decide whether to accept a plea offer for five years imprisonment, Massey failed to advise him that there was a risk that relevant conduct could increase his sentence dramatically. Second, Jones claimed that intervening changes in the law permit him to raise several sentencing errors in his § 2255 motion. Finally, Jones claimed that because he forfeited property seized as a result of his arrest, his subsequent criminal prosecution for the same offense violated the Double Jeopardy Clause.

The district court concluded that Jones's claims of sentencing error did not rise to the level of constitutional significance required for a § 2255 motion or were precluded because they were fully addressed on direct appeal. Moreover, the court concluded that those claims that Jones did not raise on direct appeal were procedurally barred. The court also found that petitioner's claim of double jeopardy

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(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

In 1993, the Sentencing Commission issued Application Note 2, which provides that to qualify for an adjustment under the provision the accused must have been the organizer, leader, or supervisor of one or more other participants. The Application further explains, that an upward departure may be warranted, but is not required under this section where a defendant did not supervise one or more participants, but nonetheless exercised management responsibility over the property, assets, or activities of a criminal organization. (Amendment 500, Nov. 1, 1993)

was without merit, considering the Supreme Court's holding in *United States v. Ursery* , 518 U.S. 267 (1996).

The district court did, however, order an evidentiary hearing on Jones's ineffective assistance of counsel claim. Specifically, the order instructed the magistrate judge to conduct a fact-finding inquiry into whether Massey's performance actually fell below an objective standard of reasonableness, the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984),[3] the standard for evaluating ineffective assistance of counsel claims. The district court adopted the magistrate judge's finding that not only did Jones's claim fail because Massey's performance did not fall below an objective standard of reasonableness, it also failed because Jones failed to establish prejudice by showing that he would have accepted the plea offer of five years but for the alleged deficiency.

On appeal, Jones raises three issues. First, he contends that the district court erred in finding that he failed to establish that Massey provided ineffective assistance of counsel. Second, he contends that the magistrate judge committed reversible error by exceeding the scope of the district court's order regarding the evidentiary hearing. Finally, Jones argues that the district court erred in concluding that a recent amendment to U.S.S.G. § 3B1.1 did not require a new sentencing hearing with respect to the district court's application of that provision to his sentence.

I. Ineffective Assistance of Counsel

Jones claims that he received ineffective assistance of counsel because Massey failed to advise him of all the possible consequences of proceeding to trial. Specifically, he claims that Massey did not advise him that the court may consider relevant conduct to enhance his sentence and that

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[3]The second prong of *Strickland* requires the petitioner to establish, in addition to the deficiency of counsel's performance, that there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. *See id.* at 694

relevant conduct under the guidelines includes prior drug deals irrespective of convictions for those deals. Moreover, Jones claims that Massey rejected the five-year plea offer before consulting him, and advised Jones that this was a good case to argue because Jones had no prior convictions and the substance he actually purchased was not cocaine. Despite Jones's testimony that Massey rejected the five-year plea offer without consulting him, the magistrate judge concluded otherwise, finding that Massey told Jones about the plea offer, advised him that it was a good deal, and that Jones rejected the offer in hopes of a favorable outcome at trial. Jones apparently took his chances between an acquittal and the statutory minimum sentence of ten years, and lost.

The district court found that Massey's performance in advising Jones of the risks involved with a trial as opposed to accepting the plea offer did not fall below an objective standard of reasonableness. We agree with this conclusion. The facts suggest that Massey adequately advised Jones with respect to the plea offer and the potential sentence that he would receive based on the information that Jones gave him. If Jones had no prior offenses, his sentence most likely would not have exceeded ten years. Crediting Massey's testimony over Jones's, the magistrate judge concluded that the evidence did not support a finding that Massey's performance fell below the objective standard of professionalism. We agree that the evidence supports this conclusion. Though Massey could have been more explicit in his advice to Jones, the record does not suggest that his performance was deficient. However, we note that counsel's conduct in failing to inquire further about his client's other conduct or to advise him of the consequences of other possible conduct comes close to being objectively unreasonable.

Even if Massey failed to advise Jones that relevant conduct could affect his sentence, Jones has not shown that he would have accepted the plea offer. The fact that he lied at trial when he knew the government was aware of his prior cocaine deals suggests otherwise. Therefore, we affirm the district court's conclusion that Massey did not render ineffective

assistance during Jones's consideration of the five-year plea offer.

II. Magistrate Judge's Report and Recommendation

Jones next argues that the magistrate judge committed reversible error when he exceeded the scope of the district court's order and found that Jones failed to meet both prongs of the *Strickland* analysis. Jones's claim is based on his belief that the district court determined, based on Jones's allegations alone, that Massey's performance was deficient. Because the district court concluded that Massey's performance was deficient, Jones reasons, the magistrate judge's sole obligation was to determine whether there were facts supporting Jones's claim that he was prejudiced by the deficiency. By finding facts regarding both prongs and recommending to the district court that Jones failed both elements of the *Strickland* analysis, Jones contends that the magistrate judge exceeded the scope of the order and essentially overturned the district court's finding that Massey's performance was deficient. This argument fails for several reasons.

First, the district court did not make conclusive findings that Massey's performance was deficient. To support his claim, Jones points to the district court's statement that: "[A]t this stage in the proceeding, [Jones] has established that his counsel failed to perform according to prevailing professional norms as required by the first prong of *Strickland*." Though compelling, the court's other statements belie the conclusive nature of this statement. Specifically, in announcing its order, the court stated that Jones's allegations that Massey insisted that he would serve only ten years, instead of the 324 months to which he was actually sentenced may, *if proven*, fall below an objective standard of reasonableness. Moreover, during its analysis of the deficiency prong of the *Strickland* issue, the district court only referred to Jones's allegations. It would be unreasonable to believe that a court would decide the performance of counsel solely on the allegations of his former client. The court's analysis simply does not warrant a conclusion that the court engaged in careful consideration and analysis with respect to Massey's performance if the court

merely considered Jones's allegations *at that stage in the proceedings*.

Additionally, the district court acknowledged that its original order lacked clarity as to the scope of the magistrate's duty. Nevertheless, the court intended and expected the magistrate judge to conduct a hearing on facts relevant to both prongs of *Strickland*. Rejecting Jones's argument, the court stated: "The court could hardly have made a factual finding based on the allegations of the petition [sic] that counsel's performance was in fact deficient."

Finally, the court conducted a *de novo* review of the magistrate's findings and adopted the magistrate's report and recommendation that the facts did not support a finding that Massey rendered ineffective assistance during his representation of Jones and, more specifically, during Jones's consideration of the five-year plea offer. Rather, the facts proved that Massey advocated the only defense available to Jones and that the "defense was undercut and destroyed by defendant's failure to fully advise counsel of his prior drug dealings." More important, the court found that Massey, though he was unaware of Jones prior drug dealing with Woods, advised Jones that the five-year offer was a "really good offer." The facts suggest that even if Jones had proved the first prong of *Strickland*, he has not shown that he was prejudiced by Massey's performance. Accordingly, we hold that the magistrate judge did not commit reversible error by conducting an evidentiary hearing with respect to both prongs of the *Strickland* test.

III. Sentencing Error

Finally, Jones claims that the district court erred by not applying the 1993 amendment to U.S.S.G. § 3B1.1 to determine whether his sentence should be enhanced under that provision. Jones's position has merit.

First, Jones's petition for relief with respect to this issue is properly before this court. The Supreme Court has stated that § 2255 permits relitigation of an issue raised on direct appeal

if the defendant is in custody and there is an intervening change in the law. *See Davis v. United States*, 417 U.S. 333, 343 (1974). Jones was sentenced on November 13, 1992 and has since remained in custody. Almost one year after his sentencing, the Sentencing Commission issued Amendment 500 which amended the application notes to § 3B1.1. According to the Commission, the amendment "clarifies" the operation of the section to aid the courts of appeals in applying it. *See* U.S.S.G. § 3B1.1, comment (n.2). The district court determined that although Amendment 500 constituted an intervening change in existing law, the amendment was not applicable to Jones because it was not retroactive. The Sentencing Commission has stated that as a general policy, amendments to the Guidelines are prospective. *See* U.S.S.G. § 1B1.10(a). Despite this general policy, the Commission has provided for exceptions. In § 1B1.10(c), the Commission lists those amendments that warrant retrospective application. In addition, the Supreme Court has acknowledged the Commission's broad and explicit power to decide whether and to what extent its amendments will be given retroactive effect. *See Braxton v. United States*, 500 U.S. 344, 348 (1991).

The district court concluded that because the Commission has the power to determine which amendments are retroactive and has specifically listed those amendments in U.S.S.G. § 1B1.10(c), the fact that Amendment 500 is not listed suggests that the Commission did not intend for it to apply retroactively.

The district court's analysis fails to recognize that the Commission may not have seen the need to list Amendment 500 in § 1B1.10 (c), because the Amendment is a clarification of the law rather than the result of a policy determination that specific conduct warranted a change in the sentence range. In other words, it is not a substantive change in the law. Several courts have drawn this distinction between amendments aimed at clarifying an existing Guideline provision and those aimed at making substantive changes in the level of punishment warranted by certain conduct. In *United States v.*

Gross, 26 F.3d 552 (5th Cir. 1994), the Fifth Circuit held that Amendment 500 applied to the petitioner's sentencing claim though it was not in effect at the time petitioner was sentenced. *See id.* at 555. The court reasoned that if an amendment that went into effect after sentencing was merely changed to clarify the application of a Guideline and not intended to make substantive changes to the Guideline, then courts may apply it to a preexisting sentence. *See id.* Whether an amendment can be considered clarifying depends on whether the Commission specifically stated so. *See United States v. Guerrero*, 863 F.2d 245, 250 (2d Cir. 1988) (Commission's view of its purpose in revising guidelines and commentary is entitled to considerable deference.)

This court has not explicitly held that such a distinction exists between amendments passed for clarification purposes and those with substantive changes with respect to the issue of retroactivity. Several of our cases, however, lead us to conclude that such a distinction has been recognized. In *United States v. Milton*, 27 F.3d 203 (6th Cir. 1994), this court discussed the distinction between amendments meant to clarify and those resulting in substantive changes to the Guidelines. *See id.* at 210. The court's analysis is instructive because it recognized that such a distinction existed. Though it rejected the defendant's claim that the amendment was retroactive, it did so primarily because it considered the amendment a substantive change rather than a mere clarification. *See id.* Specifically, this court stated: "Unless the amendment was clarifying, as discussed below, both the Guidelines and case law prohibit giving Milton the benefit of both the 1988 Guidelines range and the 1992 amendment." *Id.* In addition, in *United States v. Williams*, 940 F.2d 176 (6th Cir. 1991), this court noted that clarifications to Guideline provisions have retroactive application, while substantive changes do not. *See id.* at 182 n.4.

A petitioner is entitled to the advantage of receiving the sentence he would have received had the Commission initially drafted an unambiguous provision. It is unfair to punish a defendant for the Commission's lack of clarity,

especially when the Commission acknowledges and corrects the ambiguity. Clarification implies that prior application of the amendment resulted in errors. This is certainly distinct from the Commission's decision that a prior provision was unduly harsh or too lenient, and that a revision is necessary on that basis. Accordingly, we hold that Amendment 500 is a clarifying amendment and applicable to Jones's sentence.

Additionally, we address the district court's supposition that even if Amendment 500 applied retroactively, the leadership enhancement applied to Jones because he had managerial control over the assets--in this case drugs--of the criminal enterprise. Thus, the enhancement could apply, the court concluded, even if Jones did not have managerial control over other individuals involved in the conspiracy. This conclusion, however, is contrary to not only the language of U.S.S.G. § 3B1.1, but also to the law in this circuit. For the enhancement to apply, the application notes to U.S.S.G. § 3B1.1 require a finding that the defendant was an organizer, leader, manager, or supervisor of one or more participants. *See* U.S.S.G. § 3B1.1, comment (n.2). Nonetheless, a court may depart upward when the requirements for enhancement are not met if the defendant exercised management responsibility over the property or assets of the criminal organization. *See id.* The district court concluded that this language permitted the court to enhance a defendant's sentence regardless of whether the defendant exercised control over any persons involved in the conspiracy if the defendant exercised control over the assets of the conspiracy. The language, however, though it authorizes an *upward departure*, does not require an *enhancement* under those circumstances. Furthermore, this court has expressly stated that enhancement is not required unless the defendant exercised supervisory control over at least one other participant.

> [U]nder the amended provision, the method by which the defendant's sentence is increased depends on whether the defendant exercised control over an individual or over tangible property, assets or

> activities of a criminal enterprise. Where the defendant exerts control over at least one participant in a supervisory, managerial, leadership, or organizational capacity, a sentence enhancement is required under § 3B1.1. Whereas, where a defendant does not exercise control over an individual but over property, assets, or activities, an upward departure may be warranted.

United States v. Gort-DiDonato, 109 F.3d 318, 321 (6th Cir. 1997) (citations omitted). Thus, managerial control over the assets or tangible property of the criminal enterprise, though sufficient for a discretionary upward departure, is not a basis for enhancement under U.S.S.G. § 3B1.1. *See id.* Accordingly, a district court may not enhance a defendant's sentence on that basis.

CONCLUSION

For the foregoing reasons we **AFFIRM** in part and **REVERSE** in part, and **REMAND** for resentencing consistent with this opinion.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 1999 FED App. 0198A (6th Cir.)
File Name: 99a0198a.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RONALD D. JONES,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 97-5202

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 95-02057—Julia S. Gibbons, Chief District Judge.

Argued: September 22, 1998

Decided and Filed: May 28, 1999

Before: KENNEDY and COLE, Circuit Judges;
RUSSELL, District Judge.*

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*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Kevin M. Schad, SCHAD, BUDA & COOK, Cincinnati, Ohio, for Appellant. Stuart J. Canale, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee. **ON BRIEF:** Kevin M. Schad, SCHAD, BUDA & COOK, Cincinnati, Ohio, for Appellant. Paul M. O'Brien, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee.

AMENDED OPINION

R. GUY COLE, JR., Circuit Judge. This case first came before this panel on September 22, 1998, and was the subject of a prior opinion (*United States v. Jones*, 161 F.3d 397 (6th Cir. 1998)), in which we remanded the case to the district court for further proceedings. After we filed the opinion, the government filed a petition for rehearing en banc. Upon review of the government's petition, we vacate Section II, Part C, of our prior opinion and amend that portion of the opinion. We now affirm the decision of the district court. Our amended opinion follows.

Ronald Jones appeals the district court's dismissal of his motion to vacate his conviction or modify his sentence pursuant to 28 U.S.C. § 2255. On appeal Jones raises three issues. First, he contends that the district court erred by finding that he failed to establish that his lawyer, William Massey, provided ineffective assistance of counsel. Second, Jones claims that the magistrate judge committed reversible error by exceeding the scope of the district court's order to determine whether Jones was prejudiced by Massey's alleged deficient performance. Finally, Jones contends that the district court erred by concluding that a recent amendment to U.S.S.G. § 3B1.1 did not require a new sentencing hearing.

For the following reasons, we **AFFIRM** the judgment of the district court.

I.

On or about February 20, 1991, Jones was arrested and charged with attempted possession with the intent to distribute six kilograms of cocaine, a controlled substance.[1] The arrest was the result of a "drug deal" orchestrated by law enforcement officers. The officers gained the cooperation of Robert and Mel Woods, cousins from whom Jones had made prior drug purchases. Mel was working as an informant for DEA Special Agent James Akagi. Through the Woods' cooperation, the officers videotaped Jones's purchase of what he believed to be cocaine. Jones was arrested shortly afterwards.

Following his arrest, Jones's mother retained William Massey to defend him. Based on conversations with Jones and a review of Jones's criminal history, Massey concluded that entrapment was the only viable defense available to Jones. Because Jones's criminal history did not reflect any prior felony convictions, Massey believed that he could prove that Jones lacked predisposition to commit the offense. Considering that their defense hinged on Jones's lacking a predisposition to commit drug offenses, Massey asked Jones whether he had committed prior offenses or engaged in conduct that could affect their entrapment claim. Though it is his practice to do so, Massey does not specifically remember advising Jones that this type of relevant conduct — conduct that is not formally charged or that did not lead to a conviction — may be used by the court in determining a defendant's applicable sentencing range.

Considering Jones's absence of prior convictions, Massey assured him that if he went to trial there was little chance that the court would impose a sentence exceeding the statutory

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[1] Jones was charged with attempted possession because the substance he purchased was not actually cocaine.

minimum of ten years pursuant to 21 U.S.C. § 841(b)(1)(A). Massey was not aware at the time, however, that the government had evidence that Jones had made prior purchases from government informants involved in the current undercover operation. The government offered a plea agreement pursuant to which Jones would plead guilty and receive a sentence of five years' imprisonment. Jones rejected the plea offer, presumably based on his belief that he was subject — at most — to ten years' imprisonment. Just before trial, the Assistant United States Attorney advised Massey that the government had evidence that Jones was involved in other cocaine sales. According to Massey, he asked Jones about the government's claim and advised him that if the government indeed had such evidence it would quash their entrapment defense. Massey could not remember, however, whether he warned Jones that prior drug purchases that did not result in convictions could potentially increase his sentence. In response to Massey's warning, Jones replied: "It's my word against theirs."

At trial, Jones denied involvement in any prior drug sales. According to Jones's testimony, the current charge was the first time he dealt in cocaine, and he only did so at the insistence and urging of the police informants. The jury apparently did not believe Jones and convicted him. Rather than the ten-year sentence Jones believed to be the maximum, the district court sentenced Jones to twenty-seven years' imprisonment, taking into account as relevant conduct the amount of drugs Jones purchased from the Woods brothers on prior occasions.

In addition, the district court applied several enhancements under the guidelines to arrive at Jones's sentence. Among the enhancements it applied was an increase of two levels pursuant to U.S.S.G. § 3B1.1.[2] This guideline provision

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[2]U.S.S.G. § 3B1.1 provides:

Aggravating Role:
Based on the defendant's role in the offense, increase the

requires a sentencing court to enhance a sentence two levels if the court finds that the accused served in a managerial or supervisory role during the criminal activity. The court concluded that because Jones had a "high-level" position in the criminal enterprise as evidenced by his financial means of procuring large quantities of cocaine, he qualified for an enhancement under the provision.

Jones appealed his conviction and sentence, including the enhancement for an aggravating role in the offense, and this court affirmed. Jones then filed a motion to vacate his conviction or modify his sentence pursuant to 28 U.S.C. § 2255. Jones asserted first that Massey had rendered ineffective assistance of counsel when he failed to advise Jones of the effect that relevant conduct would have on Jones's sentence. Specifically, Jones claimed that when he had to decide whether to accept a plea offer for five years' imprisonment, Massey failed to advise him that there was a risk that his relevant conduct could increase his sentence dramatically. Second, Jones claimed that intervening changes in the law permitted him to raise several sentencing errors in his motion. Finally, Jones claimed that because he forfeited property seized as a result of his arrest, his subsequent criminal prosecution for the same offense violated the Double Jeopardy Clause.

The district court concluded that Jones's claims of sentencing error did not rise to the level of constitutional significance required for a motion seeking post-conviction

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offense level as follows:
(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

relief pursuant to §2255 or were precluded because they were fully addressed on direct appeal. Moreover, the court concluded that those claims that Jones did not raise on direct appeal were procedurally barred. The court also found that petitioner's claim of double jeopardy was without merit, considering the Supreme Court's holding in *United States v. Ursery*, 518 U.S. 267 (1996).

The district court did order, however, an evidentiary hearing on Jones's ineffective-assistance-of-counsel claim. Specifically, the order instructed the magistrate judge to conduct a fact-finding inquiry into whether Massey's performance actually fell below an objective standard of reasonableness, the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984),[3] the standard for evaluating ineffective-assistance-of-counsel claims. The district court adopted the magistrate judge's finding that not only did Jones's claim fail because Massey's performance did not fall below an objective standard of reasonableness, it also failed because Jones failed to establish prejudice by showing that he would have accepted the plea offer of five years but for the alleged deficiency.

On appeal, Jones raises three issues. First, he contends that the district court erred by finding that he failed to establish that Massey provided ineffective assistance of counsel. Second, he contends that the magistrate judge committed reversible error by exceeding the scope of the district court's order regarding the evidentiary hearing. Finally, Jones argues that the district court erred by concluding that a recent amendment to U.S.S.G. § 3B1.1 did not require a new sentencing hearing with respect to the district court's application of that provision to his sentence.

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[3]The second prong of *Strickland* requires the petitioner to establish, in addition to the deficiency of counsel's performance, that there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. *See id.* at 694.

II.

A. Ineffective Assistance of Counsel

Jones claims that he received ineffective assistance of counsel because Massey failed to advise him of all the possible consequences of proceeding to trial. Specifically, he claims that Massey did not advise him that the district court could consider relevant conduct to enhance his sentence and that relevant conduct under the guidelines includes prior illegal drug activities irrespective of convictions for those activities. Moreover, Jones claims that Massey rejected the five-year plea offer before consulting him, and advised Jones that this was a good case to argue because Jones had no prior convictions and the substance he actually purchased was not cocaine. Jones claims that Massey never stated that prior conduct could affect his sentence. Despite Jones's testimony that Massey rejected the five-year plea offer without consulting him, the magistrate judge concluded otherwise, finding that Massey told Jones about the plea offer, advised him that it was a good deal, and that Jones rejected the offer in hopes of an acquittal at trial.

The district court found that Massey's performance in advising Jones of the risks involved with a trial as opposed to accepting the plea offer did not fall below an objective standard of reasonableness. We agree with this conclusion. The facts suggest that Massey adequately advised Jones with respect to the plea offer and the potential sentence that he would receive based on the information that Jones gave him. If Jones had no prior offenses, his sentence most likely would not have exceeded ten years. Crediting Massey's testimony over Jones's, the magistrate judge concluded that the evidence did not support a finding that Massey's performance fell below the objective standard of professionalism. We agree that the evidence supports this conclusion. Though Massey probably could have been more explicit in his advice to Jones, the record does not suggest that his performance was deficient. We note, however, that counsel's failure to inquire further about his client's relevant conduct or to advise him of

the consequences of relevant conduct comes close to being objectively unreasonable.

Even if Massey failed to advise Jones that relevant conduct could affect his sentence, Jones has not shown that he would have accepted the plea offer. The fact that he lied at trial when he knew the government was aware of his prior cocaine deals suggests otherwise. Therefore, we affirm the district court's conclusion that Massey did not render ineffective assistance during Jones's consideration of the five-year plea offer.

B. Magistrate Judge's Report and Recommendation

Jones next argues that the magistrate judge committed reversible error when he exceeded the scope of the district court's order and found that Jones failed to meet both prongs of the *Strickland* analysis. Jones's claim is based on his belief that the district court determined, based on Jones's allegations alone, that Massey's performance was deficient. Because the district court concluded that Massey's performance was deficient, Jones reasons, the magistrate judge's sole obligation was to determine whether there were facts supporting Jones's claim that he was prejudiced by the deficiency. By finding facts regarding both prongs and recommending to the district court that Jones failed both elements of the *Strickland* analysis, Jones contends that the magistrate judge exceeded the scope of the order and essentially overturned the district court's finding that Massey's performance was deficient. Jones's argument fails for several reasons.

First, the district court did not make conclusive findings that Massey's performance was deficient. To support his claim, Jones points to the district court's statement that: "[A]t this stage in the proceeding, [Jones] has established that his counsel failed to perform according to prevailing professional norms as required by the first prong of *Strickland*." Though compelling, the court's other statements belie the conclusive nature of this statement. Specifically, in announcing its order, the court stated that Jones's allegations that Massey insisted that he would serve only ten years, instead of the twenty-

seven years to which he was actually sentenced may, *if proven*, fall below an objective standard of reasonableness. The court's statement simply does not warrant a conclusion that it engaged in careful consideration and analysis with respect to Massey's performance because the court merely considered Jones's allegations *at that stage in the proceedings*.

Additionally, the district court acknowledged that its original order lacked clarity as to the scope of the magistrate judge's duty. Nevertheless, the court intended and expected the magistrate judge to conduct a hearing on facts relevant to both prongs of *Strickland*. Rejecting Jones's argument, the court stated: "The court could hardly have made a factual finding based on the allegations of the petition [sic] that counsel's performance was in fact deficient."

Finally, the court conducted a *de novo* review of the magistrate judge's findings and adopted the magistrate judge's report and recommendation that the facts did not support a finding that Massey rendered ineffective assistance during his representation of Jones and, more specifically, during Jones's consideration of the five-year plea offer. Rather, the facts proved that Massey advocated the only defense available to Jones and that the "defense was undercut and destroyed by defendant's failure to fully advise counsel of his prior drug dealings." More important, the court found that Massey, though he was unaware of Jones's prior drug dealing with Woods, advised Jones that the five-year offer was a "really good offer." The facts suggest that even if Jones had proved the first prong of *Strickland*, he has not shown that he was prejudiced by Massey's performance. Accordingly, we hold that the magistrate judge did not commit reversible error by conducting an evidentiary hearing with respect to both prongs of the *Strickland* test.

C. Sentencing Error

Finally, Jones claims that the district court erred by failing to apply the 1993 amendment to U.S.S.G. § 3B1.1 — Amendment 500 — to determine whether his sentence should

be enhanced under that provision.[4] Jones argues that in finding that his conduct warranted an enhancement pursuant to § 3B1.1, the district court relied upon his control of property rather than his control of another participant. Amendment 500 and subsequent case law make clear that in order to apply an enhancement pursuant to § 3B1.1, "a defendant must manage, supervise, lead, or organize at least one participant in a criminal enterprise." *United States v. Gort-DiDonato*, 109 F.3d 318, 322 (6th Cir. 1997).

Although Jones unsuccessfully challenged the district court's enhancement of his sentence pursuant to § 3B1.1 on direct appeal, it does not appear that he specifically argued that Amendment 500 should be applied. It is well settled that an argument not raised on direct appeal is waived. *See Grant v. United States*, 72 F.3d 503, 505-06 (6th Cir. 1996). Such an argument can be raised for the first time on collateral review only when the alleged error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice." *Reed v. Farley*, 512 U.S. 339, 348 (1994) (citation omitted). It is equally well settled that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law. *See Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996); *see also Davis v. United States*, 417 U.S. 333, 345 (1974).

Whether we consider Jones's argument as an attempt at relitigation or an argument that he waived, that argument cannot be entertained in a § 2255 motion. We first note that there was no intervening change in the law in this case;

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[4]On November 1, 1993, Application Note 2 to § 3B1.1 became effective, which clarifies that in order to qualify for an enhancement under this provision, a defendant must have been the organizer, leader, or supervisor of one or more other participants. The Application Note further explains that an upward *departure* (not an enhancement) may be warranted, but is not required under this section when a defendant did not supervise one or more participants, but nonetheless exercised management responsibility over the property, assets, or activities of a criminal organization. *See* U.S.S.G. Appendix C, Amendment 500.

Amendment 500 became effective November 1, 1993, one month prior to Jones's direct appeal. Jones therefore could have raised this specific argument on direct appeal; in addition, this court had the benefit of Amendment 500 when we affirmed Jones's sentence. Moreover, an error in the application of the Sentencing Guidelines does not warrant collateral relief under § 2255 absent a complete miscarriage of justice. *See Grant*, 72 F.3d at 506. Jones's claim falls short of exhibiting exceptional circumstances or indicating a "complete miscarriage of justice." Accordingly, we find no reason to allow Jones to relitigate this claim or excuse his waiver for failing to make this specific argument at the time of his direct appeal.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.